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5 **IN THE SUPREME COURT**
6 **STATE OF ARIZONA**

7 In the Matter of:

Supreme Court No. R-20-0013

8 **PETITION TO AMEND VARIOUS**
9 **RULES OF PROCEDURE**
10 **RELATED TO CREATING THE**
11 **VERBATIM RECORD OF**
12 **JUDICIAL PROCEEDINGS**

COMMENT OF
THE STATE BAR OF ARIZONA

13 Pursuant to Rule 28(e) of the Arizona Rules of Supreme Court, the State Bar
14 of Arizona (the “State Bar”) hereby submits the following as its comment to the
15 above-captioned Petition.

16 **INTRODUCTION**

17 The Petition, from the Administrative Office of the Courts, seeks to
18 implement the recommendations of the Arizona Task Force to Supplement Keeping
19 of the Record by Electronic Means (August 2019), to expand the use of electronic
20 recording technology by Arizona Courts, as supplementation of court reporters. The
21 Petition addresses the issue of court reporter vacancies in Arizona superior courts.
22 Many of those vacancies were longstanding and consistent with the nationwide trend
23 of shortages and unavailability of court reporters.
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1 In developing this comment, the State Bar sought the input of its membership
2 in general and received input from both the State Bar's Civil Practice and Procedure
3 and Criminal Practice and Procedure Committees. This Comment essentially reflects
4 the substantive input provided by the State Bar's Criminal Practice and Procedure
5 Committee and shared by some civil practitioners. The Comment addresses the due
6 process concerns raised by certain practitioners, as discussed further below. Because
7 of the significant concerns from criminal practitioners, along with cautions raised by
8 civil practitioners, regarding how the Petition proposes to expand Arizona's courts'
9 use electronic recording technology, the State Bar opposes the Petition as presented.

12 The State Bar appreciates that the dwindling number of court reporters, who
13 face an increasing amount of hearings and transcription work, cannot be expected to
14 continually bridge the gap caused by the vacant positions in the profession. The
15 system admittedly suffers when the vacancies delay the keeping of the record.
16 However, the rule changes set forth in the Petition offer a solution that overlooks
17 due process and procedural complications, the gravity of which override the utility
18 of the proliferation of electronic recording systems across our courts. Below, the
19 State Bar highlights these concerns.

23 **I. PERSPECTIVE OF THE CRIMINAL PRACTITIONERS – DUE** 24 **PROCESS**

25 Arizona provides its citizens with a state constitutional right to appeal in

1 criminal cases. *Ariz. Const. art. 2, §24*; see also *State v. Bolding*, 227 Ariz. 82, 87-
2 88 ¶¶16-17 (App. 2011) (noting that in other jurisdictions the right to appeal in
3 criminal cases is statutory rather than constitutional.). The right to appeal in criminal
4 cases includes the right to a complete record of the trial proceedings; a record of
5 sufficient completeness to enable the appellant to have any issues properly
6 considered by the appellate court. *State v. Schackart*, 175 Ariz. 494, 498-99 (1993).
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8 The Petition proposes to remove all limitations on the use of electronic/digital
9 recording of the record in all cases. The State Bar understands that the Task Force
10 was given a mandate to recommend changes for supplementing court reporters by
11 utilizing electronic means and acknowledges that our courts must use a system that
12 utilizes both court reporters and electronic/digital recordings. But, as this Court
13 rightly noted in its Administrative Order establishing the Task Force, “Production
14 and preservation of a record of proceedings in a court of record are fundamental
15 functions of the Judicial Branch.” *Admin. Order 2019-49*. The Petition does not set
16 forth proper procedural safeguards to ensure the adequate preservation of a complete
17 record.
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19 The State Bar also believes that this Petition is premature in its proposal to
20 modify Rule 30(b)(3) of the Rules of the Supreme Court to permit electronic/digital
21 recording and transcription of capital trials, felony trials, and grand jury proceedings.
22 Anecdotal evidence suggests there will be problems with the transition from utilizing
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1 court reporters exclusively for Rule 30(b)(3) proceedings. The experience of the
2 courts in Florida is illuminating in this respect.

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4 In *Moorman v. Hatfield*, 958 So.2d 396 (Fla. App. 2007), the court discussed
5 significant problems that arose during the “shift away from using trained
6 professional court reporters” to the use of “digital recording and transcription.” *Id.*
7 at 397. One case in *Moorman* involved the appeal of a criminal contempt proceeding
8 that had been electronically recorded. The transcript of the hearing that was prepared
9 from the audio recording contained significant errors. For example, it indicated an
10 appearance by an attorney who did not exist, and the transcription errors were so
11 numerous that a new, corrected transcript was required. *Id.*

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14 *Moorman* was not limited to discussing the problems arising from a single
15 proceeding. The petitioners sought a writ of mandamus to compel a court order
16 requiring a change in the method of creating a record of all criminal case
17 proceedings, arguing that “errors in the transcripts under the new methods of
18 electronic or digital recording [were] so pervasive” as to require court intervention.
19 *Id.* at 397-98. The Florida Office of the Attorney General agreed “that digital
20 recording [had] resulted in a substantial decline in the quality of transcription.” *Id.*
21 at 398.

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24 Although the *Moorman* Court ultimately declined to issue a writ, one judge
25 on the panel noted his agreement with the petitioner and the Florida Attorney

1 General's Office: “. . . [T]here appears to have been a marked decline in the quality
2 of transcripts since the trial courts began increasing their reliance upon electronic
3 recording and minimizing the use of trained professional court reporters.” *Id.* at 399
4 (Altenbernd, J., concurring).

6 Regarding the transcriptionists employed in Arizona to transcribe
7 electronic/digital recordings, the Arizona Court Reporters Association raises several
8 critical questions:
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10 A transcript will always be only as good as the recording
11 and the transcriptionist listening to it. Since there is no set
12 of standards for transcriptionists, one must ask: Do they
13 have a minimal educational requirement? Do they have a
14 criminal record? What assurance is there they will recuse
15 themselves if they have a connection to a party or lawyer?
Are they even fluent in English? Have they been trained in
legal terminology? Medical terminology? Can they
accurately differentiate between numerous speakers?¹

16 Certified reporters, however, must meet licensing requirements, and possess
17 a proficiency in understanding and recording complex, technical vocabulary. There
18 is also a code of ethics for certified reporters.
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23 ¹ Minority Position Statement of the Arizona Court Reporters Association made in
24 response to the final report of the Arizona Task Force to Supplement Keeping of the
25 Record by Electronic Means, at p. 4, found at:
<https://acraonline.org/resources/Documents/ACRA's%20Dissenting%20Opinion%20to%20SKREM%20Final%20Report.pdf> (last visited 3/16/2020).

1 It's not just transcription errors that raise concerns. Digital recording is
2 subject to failure at any time for an indefinite length. Case law provides examples
3 of cases where problems with the recordings or the equipment resulted in the lack of
4 an adequate record. *See, e.g.,* People v. Henderson, 140 A.D.3d 1761, 32 N.Y.S.3d
5 429 (App. 2016) (proceedings could not be transcribed due to inaudibility of digital
6 recording.); *Williams v. LeBeau*, 988 So.2d 1276 (Fla. App. 2008) (Due to a
7 technical problem with the digital recording equipment, a significant portion of the
8 evidence was not recorded. Remanded.).

11 **II. TECHNOLOGICAL CONCERNS RAISED BY CRIMINAL AND** 12 **CIVIL PRACTITIONERS**

13 Currently, the courtroom electronic recording systems are not individually
14 monitored. Consequently, any system malfunction may not be discovered until well
15 after the fact, even as late as when transcripts are ordered for appeal. Running out
16 of disc space or other glitches, as simple as forgetting to start recording, means that
17 objections, arguments, and testimony may be lost. If the judicial officer is
18 responsible for operating the recording system, that invites additional allegations of
19 error if the recording is insufficient. Preservation of the record is at risk in these
20 situations. And as a practical matter, there are concerns with judges needing to divert
21 attention from the proceeding to focus on court room technology.

22 Other technical issues that may result in an incomplete or inaccurate record:
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1 • Microphones – recording systems require microphones. If a microphone
2 fails to pick up audio, it may not be discovered until the transcript is created – days
3 or weeks after the trial is complete.
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5 • Quality of the recording – When a recording is played back there may be
6 noise, feedback, static, or even varying volume levels that may lead to transcription
7 errors, changing the words of a witness.
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9 • Multiple people speaking at once – this happens all too often during trials.
10 Court reporters know when multiple speakers are preventing an accurate record from
11 being made and will immediately interrupt to make sure only one person speaks at a
12 time in order to preserve an accurate record.
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14 • Speed of speech – Many attorneys and witnesses tend to speak very rapidly
15 at various times during trials. Court reporters regularly slow the attorneys and
16 witnesses down and make sure that everyone takes their time in order to preserve the
17 accuracy of the record.
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19 • Identity of Speakers – In cases involving multiple defendants, and even in
20 some cases not involving multiple defendants, there will be many individuals
21 involved and this increases the difficulty in accurately identifying the speakers. In
22 all cases, there will be times when voices will sound similar to the person
23 transcribing an electronic recording. There will also be times when an unidentified
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1 voice will suddenly be heard. A certified court reporter assures that speakers are
2 accurately identified.

3 4 **III. DISPARATE IMPACT AND ACCESS TO JUSTICE CONCERNS**

5 The Petition notes that when a court elects to use an electronic recording
6 system to make a verbatim record of the proceedings, the parties will be free to
7 provide their own court reporter to also record the proceedings. (Petition at 8-9.) In
8 criminal cases where the defendant is indigent, this is a virtual impossibility. Public
9 Defender agencies do not have the funds to cover such an expense for capital and
10 felony trials and even if they did, the proposed rules state that the official record will
11 be the electronic record. (*See* Petition at Appendix A, pp. A-7 and A-8). Further, an
12 unofficial transcript may not be referenced or used in any court proceeding. (*Id.* at
13 A-8, Comment to Rule 30(a)). Consequently, there is virtually no benefit for either
14 side in a criminal case to utilize a certified court reporter in an electronically
15 recorded proceeding.

16 Similarly, in the circumstances of a *pro per* litigant or one with limited
17 financial means, the additional expense of a court reporter would be problematic.
18 While technological safeguards and uniform standards will improve the confidence
19 in the accuracy (without “inaudible” gaps), there remains the dilemma of a prompt
20 turnaround and the inaccessibility of a court reporter option to those litigants with
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1 limited means. In the face of the need to narrow the access to justice gap, the State
2 Bar contends this collateral consequence is not fully contemplated by giving
3 individual courts the flexibility and discretion to develop individualized electronic
4 recording standards.
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6 The proposed comment to Rule 30(b) states that in determining whether to
7 utilize electronic recording or a certified court reporter, the court should consider
8 such matters as the probability that a transcript will be requested; whether testimony
9 will be presented; whether the parties or witnesses are non-native English speakers;
10 whether difficult or technical terminology will be used; and whether it is likely that
11 daily transcripts will be needed. (*Id.* at A-8 - A-9, Comment to Rule 30(b)). The
12 State Bar submits that there is a high likelihood that most or all these factors exist
13 capital cases, and that many will also be present in most felony cases. The required
14 presence of a certified court reporter in these cases, as well as at grand jury
15 proceedings, will assure that the best possible record of the proceedings is created
16 and the possibility of mechanical or human error will be all but nonexistent.
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20 While we live in a technology-dependent world, we should not succumb to
21 technology-dependent trials, especially when life and liberty are at stake in capital
22 cases, felony cases, grand jury proceedings, and evidentiary hearings for capital and
23 felony trials. The concerns expressed in this Comment may be lessened in civil
24 cases; nonetheless, the systematic safeguards and protections afforded by the use of
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1 court reporters must be contemplated for all proceedings. Controls and systematic
2 safeguards for the use of recoding technology, as proposed in the Petition, are
3 necessary prior to a broad-sweeping replacement of court reporters for electronic
4 recording of proceedings.
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6 **CONCLUSION**

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8 For the foregoing reasons, the State Bar of Arizona respectfully requests that
9 this Court not modify the Rules of Criminal Procedure, the Rules of Civil Procedure,
10 nor the Rules of the Supreme Court to permit electronic/digital recording, and that
11 certified reporters be required to record and transcribe all such proceedings until
12 such time as uniform standards for the technology and adequate safeguards for
13 accuracy and timeliness are developed.
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15 RESPECTFULLY SUBMITTED this 1st day of May, 2020.

16 /s/ Lisa M. Panahi
17 Lisa M. Panahi
18 General Counsel
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20 Electronic copy filed with the
21 Clerk of the Supreme Court of Arizona
22 this 1st day of May, 2020.

23 by: Patricia Seguin
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